Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matter of	)	
	)	
Policy and Rules Concerning Interstate, Interexchange Marketplace	)	CC Docket No. 96-61
	)	
Implementation of Section 254(g) of the Communications Act of 1934, as amended	)	
	)	
1998 Biennial Regulatory Review – Review of Customer Premises Equipment and Enhanced Services Unbundling Rules in the Interexchange, Exchange Access, and Local Exchange Markets	)	CC Docket No. 98-183

REPLY COMMENTS OF NETWORK PLUS, INC.

Network Plus, Inc. ("Network Plus"), by its counsel, hereby submits its reply comments in the above captioned proceedings.[1] Network Plus reemphasizes its position that incumbent local exchange carrier ("ILEC") discrimination against competitive local exchange carrier ("CLEC") customers in the provision of voice mail service ("VMS") violates the Federal Communications Commission's ("Commission") bundling regulations and federal antitrust laws. Such anticompetitive behavior threatens the emergence of competition in the local exchange market and bars consumer choice. Network Plus urges the Commission to prohibit such anticompetitive bundling and illegal tying arrangements.

[1] *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Further Notice of Proposed Rulemaking, CC Docket Nos. 96-61, 98-258, released October 9, 1998 ("*NPRM*").

I. INTRODUCTION

Many ILECs manipulate their market power over VMS service, which has Station Message Detail Indicator ("SMDI")[2] capability, by refusing to offer such service unless the customer agrees to purchase the ILEC's basic telecommunications service.[3] By offering VMS-SMDI on a bundled basis *only* ("VMS-bundling"), the ILECs suppress the efforts of CLECs to compete in the local exchange market, since many residential customers and most business customers are unwilling to forego their VMS-SMDI service. Network Plus urges the Commission to reject this anticompetitive VMS-bundling practice which invariably will result in the denial of consumer choice and threaten the health of the competitive marketplace for local exchange services. The Commission has the authority to and should protect the public interest from such anticompetitive market abuses, which contravene federal antitrust laws.

II. DISCUSSION

A. The Bundling Regulations Forbid Carriers From Offering Distinct Goods and Services On A Bundled Basis *Only*, Thus Requiring Carriers To Offer Such Goods and Services Separately To Consumers

Several ILECs comment that the bundling regulations permit the bundling of enhanced services with telecommunications services so long as the underlying telecommunications services are offered separately to other enhanced service providers.[4] This, however, is only one facet of the

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[2] SMDI provides a message signal (*i.e.*, stutter dial tone or message light) that is essential to many customers.

[3] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Comments of Network Plus, Inc.*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 5-13 ("Comments of Network Plus").

[4] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, Comments of Ameritech*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 18. *See also Policy and*

Commission's policy toward bundling of enhanced and telecommunications services. The Commission has made clear that its rules prevent carriers from offering distinct goods and services *only* on a bundled basis.[5] Therefore, the Commission prohibits a carrier from refusing to offer a consumer a distinct good and/or service apart from the carrier's competitive service. This policy safeguards against anticompetitive behavior by preventing a carrier who maintains a monopoly in one product from using that monopoly to gain or maintain control in other markets. Furthermore, this policy guards against illegal tying arrangements and guarantees consumer choice.

The ILECs' assertion that they are permitted to bundle enhanced services with telecommunications services so long as they meet one condition should not be interpreted to mean that ILECs can *discriminatorily refuse* to offer a consumer a distinct product, on a separate basis, unless that consumer purchases one of their competitive products. Such a policy would defeat the purpose of the Commission's bundling restrictions, which were designed to prevent a carrier from using its monopoly power over one service to maintain or gain monopoly control over another service or market. The federal antitrust laws and the Commission's rules do not allow such anticompetitive behavior by ILECs, which clearly *harms* the public interest by denying consumer choice and hindering the development of competition. In its examination of the current need for bundling regulations, the Commission should adopt a standard that will protect the public interest and foster competition in the future.

B. The VMS-Bundling Practice <u>Fails</u> To Meet The Cellular Bundling Standard Advocated By the ILECs

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Rules Concerning the Interstate, Interexchange Marketplace, *Comments of BellSouth*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 13.

[5] *NPRM* at para. 1.

In their comments, several ILECs urge the Commission to draw comparisons between the present controversy and the *Cellular Bundling Order*.[6] The ILECs argue that the same standard applied in the *Cellular Bundling Order* to permit the bundling of CPE and cellular service should be applied in the present proceeding. In fact, though, the ILECs' VMS-bundling practice fails to satisfy even this low threshold. The central inquiry of the *Cellular Bundling Order* was whether it would be possible, given existing market conditions, for any carrier engaged in bundling to suppress competition. The ILECs' VMS-bundling practice is clearly implicated under this standard. The comments filed by Network Plus illustrate not only that is it possible for ILECs to suppress competition by bundling local service with their VMS-SMDI, but that ILECs today are consciously engaging in otherwise irrational bundling practices *designed to suppress competition*. Thus, the failure to meet even the lowest proposed standard signifies the critical urgency with which the Commission must address the anticompetitive VMS-SMDI bundling practices of the ILECs and further demonstrates the need to maintain current bundling restrictions.

Moreover, comparing the local exchange market with the cellular market is inappropriate in view of the contrast between the historic domination of the ILEC monopolies in the local service market and the relatively open playing field in the newer cellular market. For as long as ILECs wield market power over SMDI-VMS, they should be prohibited from discriminating against CLEC subscribers in their offering of VMS regardless of the subtle market equations employed in the

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[6] *In the Matter of Bundling of Cellular Customer Premises Equipment and Cellular Service*, CC Docket No. 91-34, Report and order, 7 F.C.C.R. 4028 (1992) ("*Cellular Bundling Order*"). *See*, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, *Comments of SBC Communications, Inc.*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 3-4. *See also Policy and Rules Concerning the Interstate, Interexchange Marketplace*, *Comments of Bell Atlantic*, CC Docket Nos. 96-61, 98-258 (filed November 23, 1998) at 3-4 ("Comments of Bell Atlantic").

Cellular Bundling Order.

C. No Competitive Alternative To VMS-SMDI Exists, Therefore, ILECs Monopoly Control Over Such Service Must Be Regulated To Prevent Abuse and To Protect the Public Interest

In their comments, the ILECs argue that enhanced services bundling regulation is no longer necessary because the enhanced service market is competitive.[7] While many services have enjoyed the emergence of competition, VMS-SMDI remains the nearly exclusive domain of the ILECs, which necessitates regulations to prevent abuse and protect the public interest.

The ILECs argue that they do not have market power in the enhanced service market. Bell Atlantic, more specifically, argues that competition in the voice messaging market has "thrived," noting the proliferation of answering machines.[8] The ILECs' position is incorrect. Answering machines are not equivalent alternatives. In fact, for many customers, especially business customers, answering machines are not even a comparable alternative to VMS-SMDI, which offers several real and perceived advantages over answering machines and other less advanced voice messaging services. For example, VMS-SMDI offers advances that include, but are not limited to, visual or audio signals announcing new messages, advanced options for sending, organizing and responding to messages, restricted passcode access available to simultaneous users, multiple-line coverage capable of simultaneous recording of multiple messages, and continued operation during power outages. In addition to these advances, strong customer preference for a convenient method of notification, such as SMDI, renders non-SMDI alternatives distinctly inferior. Consumer preferences are sufficiently inelastic to enable a carrier offering VMS-SMDI to exert anticompetitive

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[7] *See, e.g.*, Comments of Bell Atlantic at 9-10.

[8] *See id.*

power throughout the telecommunications market.

Evidence of Network Plus' assertions lies in the CLECs' experience with ILEC VMS customers who are interested in switching carriers. Network Plus has found that it is in fact losing customers upon their discovery that they cannot obtain service equivalent to VMS service from Network Plus. Even RCN, which offered customers a $30 rebate toward the purchase of an answering machine, reported in an affidavit filed with the Commission that three-quarters of residential customers and nearly all business customers lost interest in RCN when they learned that they would lose their VMS. (*See* RCN affidavit, attached hereto as Exhibit A.)[9]

If VMS-SMDI were not a distinct product and a competitive alternative was in fact available, Network Plus would not experience cancellations from customers who otherwise preferred Network Plus' customer service, competitive rates and telecommunications service but who could not part with their VMS. If VMS-SMDI were not a distinct product, a larger percentage of consumers would accept RCN's $30 rebate offer toward the purchase of an answering machine. If VMS-SMDI were not a distinct product, ILECs would not conclude as a "business decision" that they should refuse to provide VMS to CLEC subscribers even when the CLEC offers to assume the administrative and billing responsibilities.[10] What competitive business refuses to offer its products and services to customers without an ulterior motive?

Because VMS-SMDI *is* a distinct product, and the ILECs possess market power over VMS-

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[9] Affidavit of Ray Wood, Director of Telephony Products for RCN Telecom Services, Inc., filed in *Complaint of RCN Telecom Services of Connecticut, et al., v. Bell Atlantic-Delaware, Inc., et al.*, CC Docket No. E-98-22 (February 28, 1998). This affidavit also offers evidence to support Network Plus' assertions, made in its initial comments, that as a CLEC it cannot yet afford to offer SMDI-VMS.

[10] *See* Comments of Network Plus at Exhibit A (letter from Bell Atlantic to Network Plus justifying its VMS-bundling policy as a "business decision").

SMDI, it is possible for them to use such power to suppress competition. Therefore, the Commission must exercise its responsibility to protect the market from these anticompetitive abuses by prohibiting the bundling of basic telecommunications services with VMS-SMDI or any distinct service that is monopolized by the ILECs.

D. In Light of the Antitrust Violation, the Commission Should at a Minimum Prohibit such Illegal Tying Arrangements and Require ILECs to Offer VMS-SMDI Service as a Separate Service to All Consumers

Even if the Commission finds that removal of its bundling restrictions would serve the public interest, the Commission cannot ignore the ongoing anticompetitive, illegal tying arrangements that infect the VMS-SMDI and local exchange markets. Network Plus demonstrated in its Comments that the ILEC practice of forcing consumers to purchase basic telecommunications service with requested VMS service violates federal antitrust laws.[11] These violations deprive customers of meaningful choice for competitive telecommunications services and grind local competition to a halt. To prevent the ILECs from undermining the Commission's efforts to foster local competition, Network Plus urges the Commission to prohibit such illegal tying arrangements and to require ILECs to offer VMS-SMDI as a separate service to *all* consumers, even to consumers who choose a competitor's local service.[12]

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[11] Comments of Network Plus at 12-13.

[12] As discussed in its Comments, Network Plus notes that the California Commission has adopted such a policy requiring ILECs to offer VMS separately to all consumers. See Comments of Network Plus at 8 n. 18.

III. CONCLUSION

As set forth in its initial comments and above, Network Plus respectfully urges the Commission to prohibit ILECs from discriminating against CLEC customers in their provision of VMS-SMDI.

Respectfully submitted,

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Dated: December 23, 1998

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EXHIBIT A

COPY

Before the
THE FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of RCN Telecom Services of Connecticut, Inc., RCN Telecom Services of Delaware, Inc., RCN Telecom Services of Maryland, Inc., RCN Telecom Services of Massachusetts, Inc., RCN Telecom Services of New Jersey, Inc., RCN Telecom Services of Pennsylvania, Inc., RCN Telecom Services of Philadelphia, Inc., RCN Telecom Services of Rhode Island, Inc., RCN Telecom Services of Virginia, Inc., RCN Telecom Services of Washington, D.C., Inc., Complainants, v. Bell Atlantic-Delaware, Inc., Bell Atlantic-Maryland, Inc., Bell Atlantic-New Jersey, Inc., Bell Atlantic-Pennsylvania, Inc., Bell Atlantic-Virginia, Inc., Bell Atlantic-Washington, D.C., Inc., New England Telephone and Telegraph Company, New York Telephone Company, Defendants.	File No. ___________

AFFIDAVIT OF RAY WOOD

I, Ray Wood, being first duly sworn, depose and state as follows:

1. I am Director of Telephony Products for RCN Telecom Services, Inc. and its affiliates, RCN Telecom Services of Massachusetts, Inc., RCN Telecom Services of Rhode Island, Inc., RCN Telecom Services of Connecticut, Inc., RCN Telecom Services of New

Jersey, Inc., RCN Telecom Services of Pennsylvania, Inc., RCN Telecom Services of Philadelphia, Inc., RCN Telecom Services of Delaware, Inc., RCN Telecom Services of Maryland, Inc., RCN Telecom Services of Washington, D.C., Inc., and RCN Telecom Services of Virginia, Inc. (collectively "RCN"). My office is located at 105 Carnegie Center, Princeton, New Jersey, 08540. As the Director of Telephony Products my responsibilities include developing all telephony products for both the residential and commercial markets for RCN.

2. I hereby testify that I am familiar with the technologies used by Bell Atlantic operating companies (collectively "Bell Atlantic") in providing Voice Messaging Services ("VMS") and with the other technologies available to resellers, like RCN, in order to provide VMS.

3. RCN, and other resellers, currently cannot purchase one of the components of the VMS system from Bell Atlantic. This component, which is critical to providing service, is the VMS platform consisting of a computer and specialized voice application software enabling information to be recorded, stored and retrieved. The cost of acquiring or leasing a platform is cost prohibitive to RCN and other resellers. RCN has quotations that indicate that a platform costs approximately $125,000 for 2000-3000 mailboxes of capacity. RCN sells voice mail boxes to consumers for $5 to $7 per month. RCN does not have the volume of customers available to support a facilities-based platform. Moreover, requiring resellers to invest in the facilities to provide VMS defeats the purpose of spurring competition by allowing resale of services.

4. A second critical component of VMS is SMDI ("Station Message Detail Indicator") data lines that provide a link between the Bell Atlantic switch and the VMS platform. These data links provide information to the VMS platform about calls entering the VMS system. The information provided via the SMDI links includes, but is not limited to, the called number and the time and day of the call. The links also work in conjunction with the VMS platform to set a message waiting indication on the VMS customer's line. This last component is critical to the consumer. When the customer receives a message, the SMDI links operate to provide either a stutter dial-tone or a message lamp indicator. Without the SMDI lines, the customer has no way of knowing that a message is waiting.

5. Bell Atlantic provides SMDI links at tariffed rates. The tariffed rates, however, are so high as to be cost prohibitive. For example, in Massachusetts, Bell Atlantic's tariffed rates are $345 per month recurring fee and a one-time fee of $1,500 for each central office. With approximately 25 to 30 central offices in a metropolitan area, RCN would be required to pay $8,625 per month for SMDI and one-time fees of $37,500 prior to even offering voice mail in that area. At a cost of $8,625 per month, the purchase of SMDI lines becomes cost prohibitive. RCN would have to have approximately 1,400 voice mail customers in a region simply to break even on the recurring bill expenses if RCN billed an average of $6 per subscriber. Moreover, RCN would be forced to incur these expenses prior to being able to offer the service for resale.

6. In addition to the SMDI cost issues, to provide comparable service with the SMDI lines, RCN needs to order Call Forwarding from Bell Atlantic. Call Forwarding is needed so when the customer's phone line is busy, or there is no answer, the call is routed

to the voice mail box of the provider. This feature would cost RCN approximately $1.95 per month, per subscriber. This obviously puts another constraint on RCN.

7. In addition, Bell Atlantic has local access numbers for all of their voice mail customers. With these local access numbers, the customers pay the rate for local calls. This typically is a per message rate or is free as local calling is usuall built into the residential line rate. As a reseller, RCN does not have local access numbers across vast geographic areas as Bell Atlantic does. To offer similar service, RCN wold have to provide an 800 number to customers. This adds costs as well. For example, if a customer were to call into a voice mail box for fifteen minutes per month, this would increase RCN's per subscriber cost by approximately $1.25 per month.

8. Although a VMS system can be created without SMDI links, a VMS system that does not offer a message indicator is an inferior product from a customer's point of view. Customers consider the message indicator to be a vital component of the VMS service.

9. Accordingly, the two alternatives to obtaining VMS are cost prohibitive for resellers. RCN does not have the customer base to cover the cost of either a platform or the purchase of SMDI links to all Bell Atlantic's central offices. Indeed, the cost of reaching resale customers with an alternative VMS is so great that it constitutes an effective barrier to competitive entry into local markets. Although RCN could provide VMS without SMDI lines, the lack of a message indicator renders RCN's VMS inferior.

10. RCN's inability to provide VMS is a competitive disadvantage. Approximately 8% of the residential customers and in excess of 10% of the business customers that

contact RCN about changing service have VMS as an existing service. For those customers, RCN offers a $30 credit toward the purchase of an answering machine. Approximately 25% of the residential customers accept the $30 credit and switch to RCN. 75% of the residential customers do not make the switch because they cannot obtain comparable VMS services from RCN. Few, if any, of the business customers accept the $30 credit. For small business customers, VMS -- including a message indicator -- is viewed as a necessity.

11. Ironically, Bell Atlantic has a financial incentive to provide VMS for resellers. RCN has offered to purchase VMS at retail rates. Moreover, Bell Atlantic currently provides VMS for resale in New York pursuant to its tariff. The only reason for Bell Atlantic's refusal to deal with RCN is the prospect that it can slow down RCN's competitive entry into the Massachusetts local exchange market by making RCN's resold service less attractive to customers than Bell Atlantic's retail local service.

I hereby testify that the above information is true and accurate to the best of my knowledge, information and belief.

Ray Wood
Director of Telephony Products

Subscribed and sworn before me this 12 day of February 1998

Janice E. Mercier
Notary Public
My commission expires:

JANICE E. MERCIER
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires Oct. 11, 2000